

Prosecuting the Over Service Case

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What to expect today

- ▶ Why should you care?
- ▶ Overview of applicable laws
- ▶ Issues in charging/prosecuting generally
- ▶ Types of evidence should you be looking for
- ▶ How can you get that evidence
- ▶ Case examples
- ▶ Questions

Why should you care?

- ▶ Drunk people get stupid
- ▶ Drunk people get mean
- ▶ **Warning:** Some of the following examples are not for the faint of heart.

DUIs

▶ **State v. Pol, 2008 MT 352**

- Pol was driving a pickup down a city street in Missoula when he struck a motorcycle carrying two riders head-on. One was killed while the other was seriously injured. Pol did not stop but left the scene.
- He was stopped an hour later, 50 miles from Missoula. When he was finally processed for DUI, his breath alcohol was 0.16.

Sexual Violence

▶ **State v. Bullock, 2017 MT 182**

- Bullock, then in his mid 40's, highly intoxicated, purchased alcohol for teenagers. Teenagers ditched him along the road. Bullock was very drunk and disoriented but managed to walk to a nearby house with an open garage door. His intention was to steal the car in the garage to drive home.
- Instead he found an 8-year-old girl asleep in the car and raped her. He admitted that he “freaked out” and stopped when she told him she was only eight.

Domestic Violence

- ▶ State v. Belanus, 2010 MT 204
 - Belanus and his girlfriend picked up a 12 pack of beer at convenience store. They drank it while driving around, then returned to the same store to purchase another 12 pack.
 - Later, they went to a local bar and continued to drink until after closing time. The bartender had also been drinking and only the three remained after closing.
 - Belanus got upset because he believed the bartender and his girlfriend were flirting with each other.

- On the drive home, Belanus began striking her in the face, arms, and legs. She attempted to escape the car but Belanus dragged her back by her hair while hitting and kicking her in a fit of rage.
- After getting back to his house, he drug her inside, choked her to the point she could not breathe and she urinated in her pants, then handcuffed and raped her violently with an anal wand.
- She was able to flee in his vehicle after he passed out.

Homicide

▶ State v. Egelhof, 272 Mont. 114 (1995)

- Egelhof and two others spent the majority of the day drinking at a party and various bars. They were last seen together at approximately 9:20pm at IGA.
- RADD complaints came in reporting the vehicle driving erratically and entering the ditch multiple times, with the last complaint around midnight.
- The vehicle was found in a ditch shortly after. Egelhof was passed out in the back seat and his two companions in the front seat were dead, each killed by a single gunshot fired by Egelhof.
- Egelhof was highly aggressive and combative with LE and hospital staff. His BAC was 0.36.

Other

▶ James Bayford

- August 2017– Bayford was kicked out of the Testicle Festival outside Missoula. While getting a ride back to town in a shuttle with 8 other occupants he believed the others in the shuttle had kidnapped him so he grabbed the wheel while traveling down the interstate causing the vehicle to roll.
- 2 occupants were killed, others were injured.
- Bayford's BAC was 0.209

Drinker's safety

- ▶ Ewing v. Cloverleaf Bowl, 572 P.2d 1155 (Cal., 1978)
 - Ewing went to a bar to celebrate his 21st birthday.
 - Bartender, knowing Ewing had just turned 21, served him 10 straight shots of 151 proof rum, a vodka collins, and two beers in an hour and a half.
 - Ewing died the next day from alcohol poisoning.

Swartzenberger v. Billings Labor Temple Ass'n, 179 Mont. 145 (1978)

- Swartzenberger started drinking at the Labor Temple Bar around 8 am. Around noon he moved to the Silver Dollar Bar where he continued drinkin.
- Between 7 and 8:30 p.m., he returned to the Labor Temple where he drank beer then switched to bourbon. Bartender described that he was “loud and rowdy as usual” until he passed out in the bathroom.
- Friends woke him up and helped him up the stairs to get out of the bar. While standing with a friend waiting for a car, Swartzenberger decided he wanted another drink and pulled away to go back to the downstairs bar. He fell down the stairs and died.
- BAC at time of death was 0.37.

Overview of applicable laws

16-6-304, MCA. Providing alcoholic beverage to intoxicated person prohibited.

(1) No store manager, retail licensee, or any employee of a store manager or retail licensee may sell any alcoholic beverage or permit any alcoholic beverage to be sold to any person apparently under the influence of an alcoholic beverage.

(2) No person may give an alcoholic beverage to a person apparently under the influence of alcohol.

▶ Enacted 1933, last amended 1947

16-3-301, MCA. Unlawful purchases, transfers, sales, or deliveries.

...

(4) It is unlawful for any licensee, a licensee's employee, or any other person to sell, deliver, or give away or cause or permit to be sold, delivered, or given away any alcoholic beverage to:

...

(b) any person actually, apparently, or obviously intoxicated.

▶ Enacted 1933

Issues in charging/prosecuting

Issues

▶ Proof:

- Where was drinker?
- Who sold or provided the alcohol?
- Was drinker intoxicated at time of purchase?
- Did the bartender/cashier observe intoxication before purchase?

▶ Definitions:

- Apparently
- Under the Influence
- Intoxicated

Personal Responsibility

- ▶ Montana Supreme Court deemed it was the negligence “of him who imbibes the liquor” as the sole cause, preventing any action against the bar or bartender until 1986.
- ▶ **Nehring v. LaCounte, 219 Mont. 462; Bissett v. DMI, Inc., 220 Mont. 153 (1986)**– Court finally held that the drinker’s later negligent conduct “may be reasonably foreseeable” to person over serving.
 - But be aware, Nehring involved an innocent third party killed by bar patron. Bissett involved an 18-year-old under age drinker who suffered serious injuries after driving her car off an overpass on the way home from the bar.

Sympathy for Server

- ▶ Every juror will put themselves in that server's shoes.
- ▶ Runge v. Watts, 180 Mont. 91 (1979)
 - “Social purveyor” of alcohol can't be held liable for injuries to anyone for his/her providing alcohol to guests (even underage ones)
 - This was changed by statute in 1986

**Types of evidence should
you be looking for**

Evidence Generally

- ▶ Witness statements
 - Drinker
 - Friends/family of drinker
 - Other patrons
 - Bartender
- ▶ Surveillance video
- ▶ Alcohol purchase receipts
- ▶ Breath or Blood alcohol testing
- ▶ Other medical records concerning intoxication

Evidence outside that single event?

- ▶ What's special about a bartender or alcohol server?

16-4-1006, MCA. Responsible server and sales training program.

(1) The department shall certify all server and sales training programs that include the following:

- (a) effects of alcohol on the human body;
- (b) information, including criminal, civil, and administrative penalties, related to 27-1-710 [Dram Shop law] and this code;

. . .

- (e) training for skills to handle difficult situations and to learn evaluation techniques regarding intoxicated persons or others that pose potential liability;
- (f) a final test; and
- (g) a certificate of completion, which must be provided to participants who pass the final test.

16-4-1005, MCA. Licensees required to ensure training.

A licensee shall:

(1) require each employee who is authorized to sell or serve alcoholic beverages in the course of employment and the employee's immediate supervisor to successful training to ensure compliance with state law regarding the sale and service of alcoholic beverages. The training must be completed within 60 days of the employee's date of hire and every 3 years after the employee's initial training.

**How can you get that
evidence**

- ▶ Ask questions!
 - Where were you drinking?
 - What time did you get there, what time did you leave? Where did you go next?
 - Who were you with?
 - How did you/he/she get there?
 - How much did you/he/she have to drink?
 - How did you/he/she pay?
 - Who was your server?
 - What did you notice about him/her?
 - What were your concerns? Why?
 - Is that usual behavior for him/her?
- ▶ Try to create a timeline of events with witnesses to tie it together

- ▶ Ask for other evidence
 - Videos
 - Receipts
 - Breath sample/blood draw
 - PAST or Implied Consent for driver
 - What if it is not a driver?
 - Medical Records (signed release)

16-6-103, MCA. Examination of retailers premises

- ▶ The department of justice or its representative or a peace officer may at any time examine the premises of a retail licensee to determine whether the law of Montana and the rules of the department or the department of justice are being complied with . . .

ARM 42.13.103. DOR EXAMINATIONS

(1) The department or its duly authorized representative has the right at any time to make an examination of any premises licensed for the sale of alcoholic beverages and to check the books, records, and stock-in-trade, and to make an inventory of the latter. . . .

(2) Any authorized representative designated in (3) shall have immediate access to all parts of the licensed premises. . . .

(3) The department designates as its authorized representative, for the purpose of carrying out 16-6-103 , MCA, any member of a county sheriff's department or the police force of a city or town . . .

46-5-221, MCA. Search Warrants (Tangible objects)

A judge shall issue a search warrant to a person upon application, in writing, by telephone, or electronically, made under oath or affirmation, that:

- (1) states facts sufficient to support probable cause to believe that an offense has been committed;
- (2) states facts sufficient to support probable cause to believe that evidence, contraband, or persons connected with the offense may be found;
- (3) particularly describes the place, object, or persons to be searched; and
- (4) particularly describes who or what is to be seized.

46-4-301, MCA. Investigative Subpoena (Records)

(1) Whenever a prosecutor has a duty to investigate alleged unlawful activity, any justice of the supreme court or district court judge of this state may cause subpoenas to be issued commanding the persons to whom they are directed to appear before the prosecutor and give testimony and produce books, records, papers, documents, and other objects as may be necessary and proper to the investigation.

Server Verification


<https://svc.mt.gov/dor/liquorserver/public/certsearch.aspx>

MONTANA.GOV
OFFICIAL STATE WEBSITE

SERVICES AGENCIES LOGIN SEARCH MONTANA.GOV

[Go Back](#)

Liquor Education



[Calendar for State Classes](#) [State Certified Trainers](#) **Training Verification** [Order Materials](#) [Approved Training Providers](#)

Verify an individual's alcohol server/seller training record by entering the person's name (first and last) and their date of birth. If the person has valid training, you may print a training verification.

First Name:	Last Name:	Date of Birth:		
<input type="text"/>	<input type="text"/>	<input type="text" value="mm/dd/yyyy"/>	<input type="button" value="Search"/>	<input type="button" value="Done"/>

Case Examples

Scenario 1

- ▶ 10:30 pm Driver 1 (D1) and passenger (P1) cross into oncoming traffic on a main highway. D1 collides head-on with an oncoming vehicle. Passenger of Vehicle 2 dies instantly, Driver 2 dies at the hospital.
- ▶ D1 had to be extricated from vehicle. Later taken to hospital and medically evaluated. After medical evaluation, legal blood draw was taken with a result of 0.214.
- ▶ P1 was placed in a medically induced coma due to extent of his injuries. Legal blood draw performed after he was stabilized revealed a BAC of 0.239.

Scenario 1

- ▶ When interviewed at hospital D1 says she drank a couple Sparks (8% alcohol) between 5–8 pm and later had 4–5 double vodka cranberries at a local bar. They left around 10 pm.
- ▶ P1 also informed LE he was with D1 at the same bar and both were drinking alcohol. He couldn't remember some of the evening but remembered being in a crash after leaving the bar.
- ▶ Crash scene is approximately 15 minute drive from Bar.

Scenario 1: Bartender's Statement

- ▶ Bartender at local bar states he remembered D1 and P1 being in the bar. States he only served D1 water and she did not appear to be intoxicated in any way.
- ▶ Admits P1 appeared intoxicated and claimed he served him one beer of which he only took a sip or two. Claims they both left while it was still light outside (sunset was 8:35pm). Believes they went to another bar.

Scenario 1 : What do we need?

- ▶ Where/when did D1 buy Sparks (how many)?
- ▶ Where was she between 8:30ish (when bartender says she left) and 10:30 crash?
- ▶ Where was she drinking before crash?
- ▶ Who served her last?
- ▶ Did she appear intoxicated?

Scenario 1: Timeline

- ▶ 5pm: D1 drives to store to buy 3 Sparks. Returns home to drink them. D1's mom confirms.
- ▶ 8pm: D1 is driven to another store where she buys 2 more Sparks. Unknown when or where these were consumed. 1 empty can is in vehicle at time of crash.
- ▶ 8:30pm: D1 borrows a car to drive to bar where she says she drank 4–5 double vodka cranberries. Purchased the first one, the remaining were given to her free by the bartender.
- ▶ 10:00pm: D1 leaves Bar with P1. Drives to a convenience store where clerk refuses to sell her more alcohol because she can't stand up straight and P1 can't hold on to the alcohol package.
- ▶ 10:30pm: D1 collides head-on with vehicle killing those occupants.

Scenario 1: Other Evidence

- ▶ Numerous witnesses placed D1 and P1 at the bar between 8:30 and 10pm. All stated both appeared quite intoxicated.
- ▶ W1 stated a friend of hers was getting into the car with D1 when they were leaving the bar and she convinced him not to go due to D1's level of intoxication.
- ▶ W1 also said around 9:45pm, bartender asked her to go out back because D1 had finally made her way out of the bar and he "didn't want her to find her way back in."

Scenario 1: Other Evidence

- ▶ D1's sister stated she received a call from D1 asking her to come to the around 9:30 pm. D1 said she was drinking and the bartender and given her a free drink. D1 sounded drunk.
- ▶ D1's mother said she called D1 around 9pm while she was in the bar. She sounded drunk.
- ▶ W2 was drinking with P1 prior to going to the bar. He advised P1 was extremely intoxicated before going in. He witnessed bartender serving both D1 and P1 alcohol. Both were obviously intoxicated.

Scenario 1: Other Evidence

- ▶ Law enforcement obtained surveillance video from the second store where 2 Sparks were purchased. Corroborates D1's timeline that they were purchased before going to bar at 8:30 pm.
- ▶ Also obtained surveillance video from last convenience store where clerk refused service to D1 and P1 around 10:15 pm. Both appeared intoxicated.

Scenario 1: Issues

- ▶ Drinks from outside the bar:
 - 3 Sparks between 5–8 pm
 - 2 Sparks purchased around 8 pm–unknown when she drank them
- ▶ No evidence from the bar:
 - No receipt. One drink paid in cash, remaining were free.
 - No video surveillance from inside bar.
- ▶ No time of last drink or number of drinks:
 - Conflicting statements
 - Did bartender serve her before or after she was noticeably impaired?

Scenario 1: Outcome

- ▶ You are the jury. How would you decide:
 - Over service of P1?
 - Over service of D1?
 - Obstructing?

Scenario 2

- ▶ D1 and P1 are driving northbound on a two-lane side road, approaching a curve.
- ▶ D2 is driving southbound on the road and intentionally drives into the oncoming traffic lane and onto the opposite shoulder in an attempt to “stop” the other vehicle because he knows D1 is drunk. He believed D1 would pull over, park, and get in his vehicle.
- ▶ Instead, D1, traveling at approximately 60 mph, crashes head on into D2.
- ▶ D1 was in and out of consciousness while on scene. She provides a breath sample of 0.194 but is unable to provide a statement until over a week later.

Scenario 2

- ▶ Over a week after the crash, D1 stated she and P1 went to a nail salon inside a large grocery/department store.
- ▶ While getting their nails done, staff offered them wine which they both drank. D1 believed she was given 4–5 glasses of wine by the salon.
- ▶ D1 then went into the grocery store and purchased 3 more large bottles of wine which she took back to the nail salon to continue drinking. She didn't remember leaving the salon or anything that happened after.
- ▶ P1, interviewed over a week and half after the crash, remembered drinking wine at the nail salon but did not remember how she got it. She didn't remember getting her nails done or anything after.

Scenario 2

- ▶ D1's husband, interviewed 2 weeks after the crash, stated D1 and P1 were at his house and decided to go get their nails done. They were sober when they left.
- ▶ He left the house while they were gone and later spoke to D1 on the phone and she sounded drunk. He returned home to find D1 and P1 visibly intoxicated.
- ▶ D1 and P1 later got into a car and started to drive away to pick up their children. D1's husband attempted to stop them but couldn't, so he called D2 (P1's significant other) to warn him.

Scenario 2: What do we need?

- ▶ Timeline
 - Leave home for salon
 - Return home from salon
 - How long at home before leaving again
 - What were they doing at home
- ▶ Evidence establishing salon served alcohol
- ▶ Who served alcohol in the salon
- ▶ Were patrons intoxicated when salon served alcohol

Scenario 2: Other Evidence

- ▶ Law Enforcement was able to obtain surveillance stills from the grocery store showing D1 purchasing three large bottles of wine before walking into nail salon
- ▶ No other witnesses could be found
- ▶ No video from inside salon

Scenario 2: Issues

- ▶ Only evidence of service inside salon is D1's statement
- ▶ No timeline of when drinks served inside, before or after service by salon
- ▶ D1 purchased large amounts of alcohol to bring into salon
- ▶ No evidence D1 or P1 were intoxicated before this purchase
- ▶ D1 and P1 at home for unknown amount of time before crash; unknown if drinking

Scenario 2: Outcome

- ▶ You are the jury. How would you decide:
- ▶ Over service of P1?
- ▶ Over service of D1?

Scenario 3

- ▶ Law enforcement was notified of a single vehicle crash located at approximately 5:30 am. The vehicle had gone off the right hand side of the road around a sharp left curve and crashed into a tree.
- ▶ A single female occupant was located in the driver's seat of the crashed vehicle with the car running.
- ▶ The female believed someone else was driving because she was "obviously too drunk" to drive, but couldn't provide any information about who may have driven her car or where he/she went.

Scenario 3

- ▶ She remembered getting “hammered” at a bar 9 miles from the crash scene because she was mad at her boyfriend, but not how she left the bar.
- ▶ Female was processed for DUI and blood testing revealed a BAC of 0.182 at approximately 7 am.

Scenario 3: Bartender's Statement

- ▶ Same morning, bartender confirmed the female was at the bar the night before drinking alcohol. She arrived around 6 pm and remained there drinking until 1:45 am.
- ▶ Bartender agreed the female appeared intoxicated, and stated she tried to arrange for her to get a ride home or sleep in a trailer behind the bar. Bartender took the female's keys because she was too drunk to drive.
- ▶ The female stated she needed her keys to get her car in the morning and promised not to drive. Bartender gave her back her keys, and the female got into her car and drove away.
 - Bartender never called LE to report the drunk driver.

Scenario 3: What do we need?

- ▶ What did female drink at bar?
- ▶ When was she served last?
- ▶ Did bartender observe her being intoxicated before serving a drink?
- ▶ Was female drinking somewhere between leaving bar around 2 am and 5:30 am when crash discovered?

Scenario 3: Other Evidence

- ▶ Upon review of surveillance video, law enforcement observed the bartender serving the female the following between 6:22 pm and 1:46 am:
 - Nine 16-ounce draft beers
 - Seven shots of hard liquor
 - One mixed drink
- ▶ They also observed the female:
 - Walk around with flashing shot glasses over her breasts at 11:20 pm
 - Fall asleep at the bar at 1:00 am
 - Pass out at the bar at 1:20 am

Scenario 3: Other Evidence

- ▶ LE also learned during the evening the bartender took a bet from a patron that she couldn't drink as many shots as the patron.
- ▶ Bartender proceeded to take 8 shots of tequila in quick succession.
- ▶ She remained working as the only bartender throughout the night.
- ▶ This was before she took the female's keys and subsequently gave them back to her.

Scenario 3: Issues

- ▶ Where was female between 2 am and 5:30 am when crash discovered?

Scenario 3: Outcome

- ▶ You are the jury. How would you decide:
 - Over service of female?

Scenario 4

- ▶ Approximately 4:15 pm, 911 receives a dispatch for medical assistance to a local bar for an unconscious male.
- ▶ Bar patrons observed him pass out on the bar while sitting on the bar stool.
- ▶ They carried him to the floor and attempted to wake him up, but he is unresponsive.
- ▶ After transport to the hospital, male vomits large amounts of alcohol and a coffee ground like substance.
- ▶ His BAC is 0.279.

Scenario 4

- ▶ Male was unresponsive at the hospital for a couple hours, then became combative and started walking out of the hospital completely naked requiring restraints.
- ▶ Finally sobered up enough to be released around 6 am the next morning.
- ▶ He remembered walking into the bar and ordering a drink, but not much following.

Scenario 4

- ▶ Patron who called 911 explained she saw male drinking alone at the bar. Bartender told patron male was sad because he just buried his second child in 2 years.
- ▶ Patron noticed male was bumping into people when he walked around. After male passed out, bartender walked over and shook his arm. Male didn't respond, and bartender took what was left of drink in front of him and dumped it out.
- ▶ After a few minutes, patron went to check on him then asked her husband (retired EMT) to come help.

Scenario 4

- ▶ Patron asked others to help move male off barstool so he wouldn't fall and hurt himself.
- ▶ Laid him on floor, and attempted to revive him with no luck.
- ▶ Patron asked bartender to call 911 for medical. Bartender said no because she "didn't want to get in trouble." Instead, she asked patron to carry male out to his truck and let him "sleep it off."
- ▶ Patron called 911 herself. Told LE, it appeared bartender "more concerned about being in trouble than getting help."

Scenario 4: What do we need?

- ▶ When did male arrive at bar
- ▶ What was he served at bar
- ▶ When was he served last
- ▶ Did he appear intoxicated when served

Scenario 4: Other Evidence

- ▶ Male had a charge of \$57.75 on his credit card, but no receipt for whatever was purchased.
 - LE subsequently obtained receipt from bar showing purchase was for 6 Long Island Iced Teas, several bottles of beer, and one free “gun liquor” drink.
- ▶ LE obtained a surveillance video from the bar.
- ▶ Video starts at 2:15 pm, after male already inside drinking from a pint glass.
- ▶ Between 2:16 pm and 4:01 pm they observe bartender serve male six additional drinks, filling pint glass with something out of a liquor bottle, something from the soda gun, and something from the liquor gun.
 - Drinks are approximately 15 minutes apart

Scenario 4: Other Evidence

- ▶ During same timeframe, male is observed:
 - Going from drinking alone at bar to walking around talking to and hugging other patrons.
 - Going in and out of bar numerous times (presumably for cigarette).
 - Playing pool, stumbling and using table for balance around 3:30 pm (just before being served last drink).
 - Bumps into another patron on his way outside at approximately 3:50 pm.
 - Walks back inside staggering, holding wall then bar for balance, at approximately 3:56 pm. He nearly knocks over the barstool trying to sit down before continuing to drink.
 - Male starts bobbing his head before passing out on bar at 4:00 pm.

Scenario 4: Other Evidence

- ▶ They also observed the bartender:
 - Standing behind the bar for all this, with clear view of male in a nearly empty bar.
 - Walks up and shakes male immediately after his head goes down.
 - After patrons move male, and are on the phone with 911, bartender is seen at cash register running a card then walking over and putting something in male's pocket.

Scenario 4: Other Evidence

- ▶ Bartender testified her Long Islands are only made with 2 shots of alcohol.
- ▶ Bartender had been a trained bartender for over a decade, with most recent RASST class approximately a year and a half prior to incident.

Scenario 4: Issues?

- ▶ Male not seen staggering/falling/etc. until shortly before last drink served.
 - Never finished this drink
- ▶ Male didn't drive, no one else was hurt but him.
- ▶ No way to verify what was happening outside (drinking more?)

Scenario 4: Outcome

- ▶ You are the jury, how would you decide:
 - Over service of male?

Questions?

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